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25 JUN 1981

MEMORANDUM FOR: General Counsel

FROM: Harry E. Fitzwater
Deputy Director for Administration

DDIA REGISTRY
FILE: Legal

SUBJECT: Comments on Draft Revision of Executive Order 12036

REFERENCE: Revised Draft of Executive Order 12036, 24 Jun 81

Set forth below are my comments with respect to the Executive Order 12036 draft which I received this morning. Because of the time limitation, the size of the document, and the limitation on dissemination, I have not been able to give this important document the kind of analysis which it deserves.

1. Section 1-2(a) directs that the NSC shall "act as the highest Executive Branch entity that provides review" of "special activities," among other things. I am concerned that such NSC authority may contravene the Hughes-Ryan Amendment which places such responsibility on the President.

2. Section 1-5 provides that the DCI be responsible to the NSC "or in accordance with policies developed by the NSC, shall." I believe the "or" in the above sentence should be changed to read "and."

3. Section 1-7(d) requires senior officials to report "any" activities which raise questions of legality or propriety. Strict construction would require these officials to report any matters which are not necessarily illegal or improper but on which they may raise a question and ask for an OGC opinion. I believe the language should be changed to reflect the philosophy embodied in Sections 3-1(c) and 3-2 which require that only "serious questions of legality or propriety" be reported.

4. Section 1-~~7~~⁷(h) directs senior officials to "instruct their employees to cooperate fully with" the IOB. I believe some mechanism should be included here to ensure that such cooperation be accomplished through appropriate channels. As it stands, the IOB could claim authority to deal directly with the employees without the knowledge of their supervisors.

5. Section 1-9(b) directs the Secretary of State to "disseminate, as appropriate, reports received from United States diplomatic and consular posts abroad." This could be interpreted as including CIA reports "received" by State from stations overseas. I realize this is in the current version of E.O. 12036, but it seems to me unduly broad.

6. Section 1-12(d) should be underlined to conform with paragraphs 1-12(a), (b), and (c).

7. Section 1-12(d)(1) authorizes the military services to collect, produce, etc., information on "narcotics production and trafficking" without respect to any relationship to military interests. The old Order provides that such collection be military-related, and I believe the same limitation should be included in the new Order.

8. Section 1-12(e) should be underlined, as mentioned in 6 above.

9. Section 2-2 states that the new Order is intended to enhance "significant" intelligence, etc. It seems to me that "significant" should be eliminated. The final sentence of the Section deals with the balance between essential information and protection of "individual interests." I believe "individual interests" could be misinterpreted by the public. I think it would be better to couch this phrase in terms of the rights of U.S. persons.

10. Section 2-3 is titled "Collection of Information." In spite of the broad title, the paragraph deals with the retention, etc., of information concerning U.S. persons. I believe this creates some ambiguity with other Sections of the Order. I suggest the title be changed to refer to the collection of information on U.S. persons or else change the text to allow collection on anyone, followed by the limitation with respect to U.S. persons, as is currently included.

11. As in Section 2-3, the title in 2-4 is very broad and again I believe creates possible ambiguities in other Sections. Either the title should be changed to reflect its application within the U.S., or else the text should contain a broad statement such as is contained in Section 1-1(b) followed by limitations on collection techniques in the U.S. The penultimate sentence in this paragraph also appears to be ambiguous in its reference to "constitutional and other legal rights." I believe this reference should be limited to U.S. constitutional rights and U.S. laws.

12. Section 2-4(b) prohibits unconsented physical searches in the U.S. "except for searches by CIA of personal property of non-U.S. persons lawfully in its possession." Possession where? Under whose laws? Perhaps this need not be spelled out but it does appear to be ambiguous.

13. Section 3-3 directs the Attorney General to report to the President "any intelligence activities that violate," etc. This seems to me to place an enormous burden on the Attorney General. I believe it would be more appropriate to couch it in terms of "serious" questions of legality or propriety as set out in 3-2 with respect to IGs and GCs.

I hope my comments are useful.

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